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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES POSTAL SERVICE, CROSS-PETITIONER

v.

FORT WAYNE EDUCATION ASSOCIATION, INC., AND FORT WAYNE COMMUNITY SCHOOLS

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
JONATHAN R. SIEGEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether a regulation promulgated by the United States Postal Service providing that it is permissible to deliver unstamped letters if they are "sent by or addressed to the person carrying them" is deficient because it does not also authorize delivery of letters "on behalf of" the carrier.

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The Solicitor General, on behalf of the United States Postal Service, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (92-2024 Pet. App. 1a-22a) is reported at 977 F.2d 358. The opinion of the district court (92-2024 Pet. App. 25a-28a) is reported at 742 F. Supp. 1031.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. A petition for rehearing was denied on March 22, 1993. 92-2024 Pet. App. 23a-24a. The petition for a writ of certiorari was filed on June 21,

1993 (a Monday), and received by the Solicitor General on June 22, 1993. This cross-petition is being filed pursuant to Rule 12.3 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and proceedings below are set forth in our brief in opposition in No. 92-2024.

REASONS FOR GRANTING THE CROSS-PETITION

As explained in our brief in opposition in No. 92-2024, the decision below is correct to the extent that the court of appeals held that the Private Express Statutes prohibit Fort Wayne Community Schools (the School Corporation) from delivering unstamped letters sent by the Fort Wayne Education Association to the teachers it represents. For that reason, among others, the question presented by the Education Association does not warrant review by this Court. If this Court were to grant the petition in No. 92-2024, however, it should also review the court of appeals' holding that the Postal Service's regulation permitting corporations to carry letters "sent by or addressed to" the carrier, 39 C.F.R. 310.3(b)(1), is deficient because it fails to authorize carriage "on behalf of" the carrier.

The basis for the court of appeals' finding of a "*partial* infirmity" of the regulation, 92-2024 Pet. App. 20a, was its reading of the 1896 opinion of the Attorney General on which the letters-of-the-carrier exception is based. In that opinion, the Attorney General at one point described the letters that may lawfully be carried outside the mails as letters "sent by or addressed to the carrying company, or on its

behalf." 21 Op. Att'y Gen. 394, 400 (1896); see 92-2024 Pet. App. 18a. But on the previous page of the opinion, the Attorney General had stated that "[t]he right is to carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only," and added that "any company, or any officer or employee thereof, carrying letters which are neither written by that company nor addressed to it, is liable to the penalties imposed by the law." 21 Op. Att'y Gen. at 399. Those formulations of the scope of the exception make clear that a letter must be sent by or addressed to its carrier for carriage outside the mails to be lawful.

Moreover, in the formulation upon which the court of appeals relied, the Attorney General stated, "*as I have said*, [the exception covers] letters sent by or addressed to the carrying company, or on its behalf." 21 Op. Att'y Gen. at 400 (emphasis added). The phrase "as I have said" clearly indicates that this formulation was meant to be equivalent to the formulations on the preceding page of the opinion, which contained no reference to letters sent "on behalf of" the carrier. Thus, in using "or on its behalf," the Attorney General merely meant to make clear that if a corporate officer or employee writes a letter on behalf of the corporation, it is to be considered a letter of the corporation. In other words, the phrase "on its behalf" served the same purpose as the words "officers," "agents," and "employee" in the formulations on the previous page of the opinion. The Postal Service regulation conforms to this understanding: it provides that a letter must be "sent by or addressed to" the carrier, and it also makes clear that

"an officer or employee" may write on behalf of a corporation.

The practical consequences of the court of appeals' holding that the Postal Service's regulation is partially infirm are not entirely clear. In this case, it led the court to vacate in part the district court's decision granting summary judgment in favor of the School Corporation and to remand for further proceedings relating to communications from "joint committees" of the School Corporation and the Education Association. The court explained that "[w]e cannot on the record before us determine whether communications, if any, from these joint committees * * * are so closely sponsored by the School Corporation as to be characterized as its correspondence or as sent on its behalf." 92-2024 Pet. App. 21a-22a. The apparent reason for that supposed deficiency in the record is that the parties had raised no dispute relating to letters sent by any joint committee under the collective bargaining agreement. And it may be that any such correspondence sent by a joint committee would be covered either by the portion of the regulation at issue in this case or by a separate portion of the Postal Service regulation, 39 C.F.R. 310.3(b)(3), that gives effect to *United States* v. *Erie R.R.*, 235 U.S. 513 (1915), where the Court held that a railroad may carry letters concerning a joint venture of the railroad company and a telegraph company.

It may be, however, that the court of appeals intended its holding that the regulation is partially infirm to have a broader effect, since it described the perceived infirmity of the regulation as "subtle but significant." 92-2024 Pet. App. 18a. It is difficult to tell what the court meant, because its finding of an

infirmity did not relate to any dispute between the parties. In any event, if the Court were to grant the petition in No. 92-2024, we would argue that the court erred in finding an infirmity in the Postal Service's regulation. Because the logic of that argument would lead to the conclusion that the district court's judgment should have been affirmed, and hence that the court of appeals' judgment should be modified, we are filing this cross-petition out of an abundance of caution to ensure our right to defend the Postal Service's regulation as written. See *Strunk* v. *United States*, 412 U.S. 434, 435-437 (1973); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 384-387 (6th ed. 1986).

At the same time, as we explain in our brief in opposition in No. 92-2024, the question presented by the Education Association—which challenges the court of appeals' holding that the "vast majority" of the letters that the arbitrator ordered the School Corporation to deliver may not be carried outside the mails, 92-2024 Pet. App. 21a—does not merit review by this Court. The court of appeals' holding that the Postal Service's regulation is partially infirm does not independently merit review, since the practical effect of that holding is so unclear. But if the Court were to grant the Education Association's petition, it should also grant this conditional cross-petition so that the Court may review the judgment below in its entirety.

CONCLUSION

If the Court grants the petition in No. 92-2024, it should also grant this cross-petition. If the Court denies the petition in No. 92-2024, this cross-petition should also be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
JONATHAN R. SIEGEL
Attorneys

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